BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS E. DARNELL	)	
Claimant	)	
VS.	)	
	)	
RONALD HERPICH TRUCKING	)	
Respondent	)	
AND	)	Docket No. 175,232
	)	
UNINSURED	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund and claimant both appeal from an Award entered by Administrative Law Judge Steven J. Howard on July 16, 1997. The Appeals Board heard oral argument November 18, 1997.

APPEARANCES

Davy C. Walker of Kansas City, Kansas, appeared on behalf of claimant. Robert L. Kennedy of Kansas City, Kansas, appeared on behalf of respondent and its insurance carrier. J. Paul Maurin, III, of Kansas City, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant to be permanently and totally disabled. He then assessed the Award against the Kansas Workers Compensation Fund (Fund) on the basis of findings that respondent was uninsured and unable to pay the benefits ordered. The issues on appeal are as follows:

1. Whether claimant's injuries arose out of and in the course of his employment. Claimant worked as a truck driver under an arrangement which the Fund and respondent contend made claimant an independent contractor, not an employee.

2. Whether at the time of the accident there existed the relationship of employer and employee and whether claimant substantially deviated from his employment. Respondent offered evidence that at the time of the accident claimant had deviated from the logical route of the haul for which respondent had originally contracted and claimant was on his way to pick up a load respondent knew nothing about. The Fund and respondent contend that even if claimant was an employee for purposes of the originally-contracted haul, claimant had deviated from the employment and was no longer acting as an employee at the time of the accident.

3. The claimant's average weekly wage. Claimant was to be paid 80 percent of the gross receipts for each load but was to pay for his own fuel, tires, and maintenance. The ALJ found claimant's average weekly wage was $292.80. The Fund contends the wage should be $73.53 and claimant contends the wage should be $1,471.37.

4. The nature and extent of claimant's disability. The Fund and respondent contend the evidence does not support the conclusion claimant is permanently and totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be affirmed.

Findings of Fact

1. On June 19, 1992, claimant was injured in Knox County, Indiana, when the truck claimant was driving collided with a farm tractor pulling a disc. Claimant was thrown through the windshield and into the disc. His injures included a fractured femur, broken jaw, broken ribs, crushed trachea, split pallet, cut eye, facial lacerations, and a hip injury which ultimately required replacement of the hip.

2. At the time of the accident, claimant owned the tractor he was driving and had leased it, with driver, to respondent. Claimant was to furnish oil, gasoline, tires, and repairs for operation of vehicle. The lease agreement provided that claimant, as a lessor, was to receive 80 percent of the load revenue. Respondent, as lessee, acquired "exclusive possession, control, and use" of the leased equipment.

3. Claimant had, on a prior occasion, worked for respondent when claimant did not own the vehicle. Under the prior agreement, claimant was paid 25 percent of the load revenue. Claimant had then left work for respondent and worked for another trucking company. Claimant returned to hauling loads for respondent when he had the opportunity to purchase a truck from respondent's landlord, Mr. Snielling. Claimant did purchase the truck through a financing arrangement with Mr. Snielling.

4. On May 29, 1992, claimant and respondent entered into the lease claimant was operating under at the time of the accident. Claimant testified that to his knowledge all the terms of his agreement with respondent, except the 80 percent and his responsibility for gasoline, tires, and repairs, were the same as they had been when he did not own the vehicle. He kept his tractor on company property. He received instructions from respondent about what load to pick up and where to take it. He agreed he could once in a while turn down a load but testified he also could turn down a load when he was working under the 25 percent agreement and did not own the tractor. Respondent had its decals on the tractor and trailer. Respondent's company name was placed on the side of claimant's tractor. Claimant testified he could not contract with another carrier without approval from respondent. Respondent had the necessary permits to operate as a carrier.

5. Respondent has offered testimony which, in part, conflicts with claimant's description of their agreement. Ronald Herpich, owner-operator of respondent trucking company, testified claimant was free to turn down loads, more so than other drivers who did not own their own truck, and was free to contract with other carriers without his permission.

6. The Board finds that, with the exception of the rearranged financial responsibilities, claimant's agreement with respondent was essentially the same as it had been before he purchased the truck and the same as other drivers who did not own the truck. The Board finds, based on the language of the lease agreement and claimant's testimony, that claimant was not, in fact, free to contract with other carriers without permission from respondent. The lease agreement gave respondent exclusive use and control. The Board also finds that claimant was no more or less free to turn down loads than other drivers.

7. The Board finds that respondent retained, under the agreement with claimant, the right to control the manner and methods by which claimant performed his duties.

8. Claimant made two trips under the lease agreement before the accident on June 19, 1992. Claimant also made one trip after signing the lease which was not under the lease because claimant did not yet have a license. This trip was to Atlanta and claimant also had a wreck during that trip. Neither claimant nor respondent offered any evidence about what, if anything, claimant was paid for that trip. The first trip pursuant to the lease began June 11, 1992, and went from Kansas City to St. Louis, from St. Louis to locations in Nebraska, and returned to Hutchinson and Kansas City. The total revenue for the trip was $1,839.21 and claimant's 80 percent portion would have been $1,471.37. Claimant was

given an advance of $650 for expenses on the trip but the record does not show how much his actual expenses were.

9. The second trip was the trip during which the accident occurred. It was pursuant to contract between respondent and Precision Transportation. This trip also originated in Kansas City. Claimant was to deliver part of the load in Illinois and deliver the remainder to Bloomsburg, Pennsylvania. Claimant blew an engine in Evansville, Indiana. Respondent had advanced claimant $300 for expenses and when the truck broke down, Precision advanced another $1500 for repairs. It appears that during claimant's discussions with Precision at this time, Precision also arranged for claimant to pick up another load in Indianapolis, Indiana. The details are not in evidence, in part, because the accident caused claimant to suffer a memory loss. Ronald Herpich testified, however, that after the accident Precision told him about the additional load. Mr. Herpich testified he did not know whether he would have received any revenue for this additional load. He was not aware of the load until after the accident. Ronald Herpich reimbursed Precision for the $1500 advance made to claimant by deducting that amount from what Precision owed respondent for a previous haul. The second trip, as originally arranged between respondent and Precision, would have paid respondent a gross amount of $1,361.70. But because of the accident and damage to the load, respondent did not make any money on this haul.

10. Claimant did not, in fact, receive any money from respondent, other than the advances, for any of the hauls made pursuant to the lease agreement. Claimant also did not, in fact, make any payments on the truck before it was wrecked.

11. The record contains no evidence about the actual expenses claimant incurred on either of the two trips taken under the lease agreement. Mr. Herpich testified that fuel will cost generally 30 percent of the 80 percent, repairs 15 percent, insurance 4 to 5 percent, and tires 5 percent. The truck owner may also, as claimant did, have a payment to make on purchase of the truck. Mr. Herpich also testified a driver owner is lucky to make 20 percent of the 80 percent after expenses. Claimant's counsel proffered testimony that claimant earned $750 per week when operating under the 25 percent agreement. But claimant did not actually give such testimony. Charles Flakus, another driver operating under an agreement for 23 percent of the revenue (as opposed to the 25 percent claimant had received when he previously worked for respondent), testified he generally made $1000 per week.

12. Claimant suffered multiple injuries from the accident. He has had surgery to his eye and must use drops to lubricate the eye. He has no side perception in his right eye. He has had to have false teeth but cannot wear them because they hit a nerve. He lost some of his sense of smell and taste. He gets headaches if he tries to read or watch television too long. He has a short-term memory loss. He cannot sit in one position for an extended period. He has a limp and uses a cane much of the time. He has had multiple surgeries, including a hip replacement, and uses a neural stimulator on his legs every 10 to 12 hours.

If he does not use it, his legs cramp up. He has other injuries described in more detail in the report and deposition of Dr. Glenn A. Barr and claimant's testimony.

13. Two physicians evaluated claimant's disability. Dr. Edward J. Prostic rated the impairment for the hip only as 22 percent of the body. Dr. Barr testified claimant is permanently and totally disabled. He added the impairment ratings for injuries to the various parts and arrived at a total disability of 164 percent. Of this percentage, 60 percent was for the vision problems claimant now has. In rating that impairment, Dr. Barr relied on the rating by another physician. The Fund objected to that portion of the rating because the other physician, an ophthalmologist, did not testify. In concluding that claimant is totally disabled, the Board has not relied on the 60 percent rating as the Board agrees with the Fund's objection and finds that rating shall be excluded. The Board has, however, relied in part on claimant's testimony about vision problems.

Conclusions of Law

1. The Board finds claimant was an employee of respondent. The employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer-employee relationship. Scammahorn v. Gibraltor Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966). Although other factors in this case suggest an independent contractor relationship, for example the ownership of the truck and pay based on a percentage of the revenue, the Board, nevertheless, concludes the elements of control fix the relationship as an employer-employee relationship, not an independent contractor relationship.

2. The Board also concludes the side arrangement between Precision Transport and claimant did not take claimant out of the employment relationship even if claimant had deviated from the logical route originally intended when respondent contracted with Precision. The agreement between respondent and claimant grants respondent exclusive use of the tractor. In our view, claimant could not separately contract with Precision outside of the agreement and respondent would have been entitled to the revenue from the extra haul. Claimant was not deviating from his employment; he had only undertaken an additional haul as a part of that employment.

3. The Board finds claimant's average weekly wage was $294.27.[1] For employees who have worked at least one full week and who are paid on a commission basis, the average weekly wage is calculated by dividing the total earnings by the number of weeks worked up to a maximum of 26 weeks. K.S.A. 44-511. Claimant was employed from June 11, 1992, to June 19, 1992, or slightly more than one full week.

[1] As explained below, this affirms the method used by the ALJ to calculate the average weekly wage. The number used varies slightly apparently due to rounding by the ALJ.

For the first trip, the trip beginning June 11, 1992, respondent received revenues of $1,839.21 and 80 percent of that amount, or $1,471.37, would be claimant's portion. That trip covered a five-day period from June 11 through June 15.

The Board finds no logical way to determine what the economic consequences would have been for the second trip. We know that the total revenue was expected, absent the additional load from Indianapolis, to be $1,361.70 from which claimant would have received 80 percent, or $1,089.36. Although we know that, because of the accident and previous engine problem, respondent considered itself to have lost money. We also know claimant was advanced $1800 which it would be logical to assume claimant would have had to reimburse respondent if the relationship continued, but it did not. In addition, we do not know whether all of that amount was spent on expenses. In short, we cannot calculate the wage or loss of wage from that trip.

It is, in fact, difficult to calculate the wage claimant earned on the first trip from a lack of information about what his expenses were. Respondent has testified to some general percentages typical for gas, insurance, and maintenance. Respondent also testified that an owner is lucky to net 20 percent of gross. While it seems unusual to purchase a truck and then receive 20 percent of 80 percent while drivers who do not own their truck receive 23 to 25 percent of 100 percent, nevertheless, this testimony appears to be the most concrete evidence in the record on this issue.

Claimant has the burden of proving his wage and has not proven that he would have earned more than the 20 percent of 80 percent to which respondent testified. Twenty percent of the $1,471.37 gives $294.27 and claimant earned this amount in during the essentially one week (five working days) on the first trip. As above indicated, the record contains a proffer from claimant and testimony from Mr. Flakus indicating a higher wage of $750 to $1000 for others doing similar work. The question here is not, however, what is the wage generally for the work like that performed by claimant, but what, in fact, was claimant's wage. The circumstances here suggest claimant would not likely have earned what is commonly earned. The Board, therefore, finds that claimant's average weekly wage was $294.27.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Steven J. Howard on July 16, 1997, should be, and is hereby, affirmed.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Thomas E. Darnell, and against the Kansas Workers Compensation Fund, for an accidental injury which occurred June 19, 1992, and based upon an average weekly wage of $294.27, for

132 weeks of temporary total disability compensation at the rate of $196.19 per week or $25,897.08, followed by 505.14 weeks at the rate of $196.19 per week, or $99,102.92, for a permanent total disability award not to exceed $125,000.

As of June 30, 1998, there is due and owing claimant 132 weeks of temporary total disability compensation at the rate of $196.19 per week, or $25,897.08, followed by 182.57 weeks at the rate of $196.19 per week in the sum of $35,818.41, for a total of $61,715.49 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $63,284.51 is to be paid for 322.57 weeks at the rate of $196.19 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, Kansas City, KS
Robert L. Kennedy, Kansas City, KS
J. Paul Maurin, III, Kansas City, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director